SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1969

No. 864

ROBERT P. BURRUSS, VIRGINIA R. BURRUSS, JAMES C. TENNANT, JAMES L. TENNANT, ET AL.,

Appellants,

v.

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia, Harrisonburg Division

MOTION TO DISMISS OR AFFIRM WITH APPENDIX

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PRELIMINARY STATEMENT

Pursuant to Rule 16, the Appellees file their motion to dismiss this appeal or, in the alternative, to affirm the judgment of the three-judge court entered pursuant to its opinion of May 23, 1969.

STATEMENT OF THE CASE

Appellants are parents and the children of such parents, all being residents of Bath County, Virginia, such children being enrolled in the public schools of Bath County.

Appellees are the Superintendent of Public Instruction of the Commonwealth, the Comptroller of the Common-

wealth, the State Treasurer, the Clerk of the State Senate, the Clerk of the House of Delegates and the State Board of Education.

The allegations of the "Motion for Declaratory Judgment" filed in the court below are as follows, with paragraph numbers of the Complaint as indicated:

Under Section 129 of the Virginia Constitution, the Commonwealth has assumed and is charged with the establishment and maintentnce of an efficient system of free schools throughout the state (6) and having undertaken this duty as required by the equal protection clause of the Fourteenth Amendment of the United States Constitution to dischrarge this responsibility on an equal basis for all children in the state. (7)

Under Section 135 of the State Constitution, the State has enacted the Basic State School Aid Fund (8), and in compliance with Section 129 has distributed funds as set forth in the formula (presumably the formula under the Basic State School Aid Fund Act), has lent money from the State Literary Fund, and has distributed sales taxes. (9)

The Bath County Board of Supervisors has levied real estate, personal property, and sales taxes and has sold bonds to supply the major share of the school operational funds and capital expenditures. Under Section 136 of the State Constitution this action on the part of the Board of Supervisors is authorized but is discretionary. (10)

The apportionment of State funds to localities has resulted in the existence of substantial disparity between the quality of education and the extent of available educational facilities and services in Bath County and in other localities. (11) As a result, the children of Bath County are deprived of educational opportunities available to children in other localities of the State and are denied equal opportunity to education through public schools when com-

pared to the opportunities available to children in other cities and counties. (12) The same effects result directly from the method employed by the State in the distribution and apportionment of State funds, and by this apportionment of State funds the State violates the rights of plaintiff children to equal protection of the law in violation of the Fourteenth Amendment. (13)

The Basic State School Aid Fund Act, and particularly its formula for apportionment of State funds, creates a condition denying the plaintiff children educational opportunities equal to those enjoyed by children in public school in other districts of the State and is, therefore, repugnant to the equal protection clause of the Fourteenth Amendment in the following respects: (i) fails to relate to educational needs and the acuteness thereof and fails to take into account any factors which would tend to equalize educational opportunities, (ii) fails to correct differences in quality of physical facilities, (iii) fails to take into account differences in levels of school construction costs, salaries, and other expenses which prevail in different areas of the State, and (iv) fails to take into account the added cost of providing substantially equal educational opportunities to children who live in extremely disadvantaged rural areas and who lack preschool background and extracurricular experiences. (14)

The General Assembly has failed in its duty to maintain an efficient school system throughout the State in that Bath County schools are deficient in the following respects: (i) Insufficient number of schools with adequate buildings and equipment, (ii) Insufficient number of qualified teachers, (iii) Insufficient course offerings when compared with schools in other localities, (iv) System deficient in the basic facilities, services and other basic matters, and (v) Graduates of the system enter adult life with an initial dis-

advantage (15). As a result, students in Bath County are denied their right to equal protection and are denied equal opportunity to an education which would allow them to compete on an equal basis with graduates of school systems in other counties and cities. (16)

The Appellants prayed in the court below:

(A) That the act and formula be declared void and without force and effect as repugnant to the equal protection clause of the Fourteenth Amendment.

(B) That jurisdiction be retained to afford the General Assembly of Virginia a reasonable time to reapportion school funds in a manner which will provide substantially equal educational opportunities for all children in the Commonwealth; and should the legislature fail to do so, that the Court enter its order apportioning the school funds in a manner satisfactory to the fulfillment of the obligations undertaken by the Commonwealth and complying with the equal protection clause of the Fourteenth Amendment.

(C) That the Court enter judgment that the General Assembly has failed to comply with Section 129 of the State Constitution and with the equal protection clause of the Fourteenth Amendment.

(D) That the Court retain jurisdiction to afford the General Assembly a reasonable time to establish and maintain an efficient free public school system in Bath County, which will provide substantially equal educational opportunities for all children of the Commonwealth, and should the General Assembly fail to do so, that the Court enter its order so doing.

(E) That the Court enjoin the Superintendent of Public Instruction, the Comptroller, the Treasurer, and the State

Board of Education and their agents from further disbursement from the School Fund under the Act.

In the court below, the Appellees filed a Motion to Dismiss on the grounds, among others, that (1) the complaint failed to state a claim upon which relief can be granted, and (2) the court lacked jurisdiction to order affirmative relief requested by the Appellants.

The court below overruled the Motion to Dismiss and subsequent thereto an answer was filed denying all facts alleged in the complaint except the identity and status of the Appellees which were admitted.

The Appellants took depositions and introduced numerous exhibits. By stipulation of counsel, these were made part of the record in the court below.

The formula for the distribution of the Basic State School Aid Fund which is under attack in this case recognizes the principles of need, effort and ability. It may be applied to any increased appropriation by the General Assembly of Virginia in support of a program raising the level of public education (Exhs. 7 and 8).

As set forth in *Shepheard v. Godwin*, 280 F.Supp. 869, 872-873, beginning in 1948, this Minimum Education Program was established by the legislature. It represented a program to provide each child in the Commonwealth of Virginia with a minimum education. The Basic State School Aid Fund was thus created to fix a minimum program cost for every school district in the State.

This minimum program cost is now determined to be the aggregate of (1) the amount of instructional salaries under a stated formula for each teacher position and of (2) the product of the average daily attendance (ADA) multiplied by $110.00 per pupil. Every school district is required to expend at least this total each year.

The State contribution is comprised of a basic State share and a supplementary State share. The basic State share is 60% of the instructional salaries and the supplementary share is arrived at by subtracting from the minimum program cost (the gross instructional salaries plus the total of $110.00 per pupil ADA) the basic State share and an amount equivalent to a uniform tax levy of $.60 per $100.00 of true values of local taxable real estate and public service corporation property in the school district. (See Exh. 8 for a detailed explanation of the formula).

It is interesting to note that the ADA was multiplied by $80.00 in 1964-66 and by $100.00 in 1966-68 thus indicating the continuing desire of the General Assembly of Virginia to raise the level of public education. (Exhs. 7 and 14).

As the court below found, there are deficiencies and differences in the Bath County school facilities when compared with those in some of the more affluent political subdivisions in Virgina. This, of course, is the obvious result of decentralization. However, neither the virtues nor the validity of decentralization have been questioned. See also *McInnis v. Shapiro*, 293 F.Supp. 327, 333.

Though the facts are not really in issue, the Appellees cannot permit some of the misstatements and misleading implications contained in the Jurisdictional Statement of the Appellants and in the *amici curiae* briefs to go unnoticed.

For example, the brief of the National Education Association, et al., states that in Bath County there are "school cafeterias with earthen floors" (page 10). The record in this case does not sustain such a statement and, in fact, it is a false statement.

It is also stated that Bath County now taxes itself at the maximum level permitted by State law and during this

school year will spend 93% of its total tax revenues on its school system. While it is true that the limitation on the regular school tax has been reached by Bath County and by all Virginia counties under § 22-126 of the Code of Virginia; § 22-127 of the Code of Virginia permits the County to appropriate other money from the general county levy. (Tr. pages 157-158).

For the current school year, the testimony was that the anticipated revenues of Bath County for the year beginning July 1, 1969, were $570,420.00 and of that amount $462,000.00 was to be allocated to the schools (Tr. p. 104). This would mean that Bath County will spend approximately 80% of its revenues on its school system, and not 93% as alleged.

As to teacher salaries and accreditation, it should be noted that 50% of the counties in Virginia have lower salary schedules and at least one such county has 100% certified teachers (Tr. pp. 49-50). In Bath County those who had not been issued normal professional certificates were older teachers and were well qualified (Tr. p. 57).

It was also conceded by the Superintendent of Schools that his salary scale for teachers compares very well with other counties in Virginia and that he was in a competitive position as to employment of teachers (Tr. p. 155).

The Superintendent of Schools answered "no" to the question concerning whether a graduate of the two high schools in Bath County could "get into every school in this State" but could point to only one college under State control, The College of William and Mary. He also pointed to only three other schools. These were expensive private colleges for girls. (Tr. p. 79). The Superintendent failed to mention that there were ten other four-year colleges and universities under State control and many two-year com-

munity colleges. Also, it should be noted that there are twenty-two private four-year colleges in Virginia and twelve junior colleges (Exh. 2-B).

Further, the curriculum at both high schools meets the present State accreditation standards (Exh. 11) and the Superintendent testified that eight out of the fifteen graduates of the small high school in Bath County went to college last year (Tr, p. 14). The county average in Virginia of 1967 high school graduates attending college was 46% (Exh. 3-A).

During 1967-68 based on 1966 real estate and public service corporation values, Bath County ranked 22nd in ability to support a school system out of the 130 county and city school districts. However, Bath County ranked only 109 among the counties and cities in effort (Exh. 3-A, p. 6).

Bath County's Public school indebtedness as of January 1, 1967, was only $108,300.00. This was the lowest of the 96 Virginia counties with the exception of Powhatan County with a debt of $105,900.00 and the Counties of Cumberland and Patrick which had no public school indebtedness (Exh. 7, pp. 93-96).

THE STATUTE INVOLVED

The Appellants complain of the distribution of the Basic State School Aid Fund which is found as Item 564 of the Appropriation Act of 1968 (Acts of Assembly, Vol. 2, 1968, page 1486). This Act is found as Appendix B of the Appellants' Jurisdictional Statement.

THE ISSUES PRESENTED

1. Does the Fourteenth Amendment require that public schools expenditures be made only on the basis of educational needs of the students; and

2. Does the lack of judicially manageable standards make this controversy nonjusticiable?

ARGUMENT

For the purposes of this Motion the Appellees rely upon the case of *McInnis* v. *Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968) aff'd (per curiam) *sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (March 24, 1969).

It is the Appellees' contention that the decision of the three-judge District Court of Illinois affirmed by this Court controls the issues presented in this case.

The method of financing public education in the State of Illinois is similar in all material respects to the method used in this State. Section 1 of Article VIII of the Constitution of Illinois directs the legislature to "provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." In Section 129 of the Virginia Constitution it is likewise provided that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

In fulfilling its constitutional mandate, the Illinois General Assembly delegates authority to local school districts to raise funds within the district by levying taxes for educational and building purposes. See, Ch. 122, § 17-1 *et seq.*, Ill. Rev. Stat. (1967). The General Assembly of Virginia does likewise. See, §§ 22-126 and 22-127 of the Code of Virginia.

The Illinois legislature authorizes school districts to issue, subject to referendum, bonds for the purpose of construction and repair of schools and school property. See, Ch. 122, § 19-1 *et seq.*, Ill. Rev. Stat. (1967). Sections 15.1-175 and 15.1-185 of the Code of Virginia provide for the issuance of bonds by localities for school construction.

Section 18-1 *et seq.*, Ill. Rev. Stat. (1967), establishes a common school fund and provides for its apportionment to the various school districts by the Superintendent of Public Instruction. The Illinois apportionment formula is set forth in § 18-8 of Ch. 122. The minimum program is based upon average daily attendance and the local share is based upon assessed values of real estate. This, of course, is similar to the Virginia formula which is found as Item 564 of the Appropriation Act of 1968, page 1480.

The qualifying rate for the school district to participate in Illinois' school equalization fund is $.74 per $100.00. See, § 18-8, Ill. Rev. Stat. (1967). The qualifying rate for such participation in Virginia is $.60 per $100.00. See, Item 564 of the Appropriation Act of 1968.

As pointed out in *McInnis*, 293 F. Supp. at pp. 330 and 333, the State of Illinois guarantees a flat grant to local school districts. The Commonwealth of Virginia does likewise by guaranteeing 60% of salaries of teachers in State aid positions based on the State minimum scale. See, Item 564, Appropriation Act of 1968, page 1480.

An examination of the School Code of Illinois and the School Code of Virginia also reveals that both states provide special aid funds to local school districts in such fields as transportation, special education, vocational education and teacher retirement.

To facilitate comparison of the Virginia and Illinois methods of financing public education the following is submitted as a summary of what is said above:

Requirements for and Methods of Financing Public School Education

1. The State Constitution requires the legislatures to

In Illinois — "Provide a thorough and efficient system of free schools" (Sec. 1, Art. VIII, Constitution)

In Virginia—"The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." (§ 129 of Constitution)

2. General Assembly delegates authority to local school districts to raise funds within the district

In Illinois—Ch. 122, § 17-1 *et seq.* Rev. Stat. (1967)

In Virginia—§§ 22-126 and 22-127 of Code

3. School districts may issue bonds for school construction, etc.

In Illinois—Ch. 122, § 19-1 *et seq.* Rev. Stat. (1967)

In Virginia—§§ 15.1-175 and 15.1-185 of Code

4. Apportionment formulas for distribution of state funds

In Illinois—Ch. 122, § 18-8

In Virginia—Item 564, Appropriation Act of 1968

5. Elements of the formulas:

a. Minimum program based on average daily attendance

In Illinois—Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—Item 564, Appropriation Act of 1968

b. Local share based on assessed value of real estate

In Illinois—Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—Item 564, Appropriation Act of 1968

c. The qualifying rate for a school district to participate in school equalization fund

In Illinois—$.74 per $100, Ch. 122, § 18-8 Rev. Stat. (1967)

In Virginia—$.60 per $100, Item 564, Appropriation Act of 1968

d. A flat grant is guaranteed to local school districts*

In Illinois—*McInally v. Shapiro*, 293 F. Supp. at pp. 330 and 333

In Virginia—Item 564, Appropriation Act of 1968

6. Special aid funds, such as transportation, special education, vocational education and teacher retirement are provided by the state.

In Illinois—See generally, the School Code of Illinois

In Virginia—See generally, Virginia School Laws and Appropriation Act of 1968

* Illinois' minimum is $400.00 per pupil in ADA. Virginia's minimum is 60% of qualifying teachers' salaries plus $110.00 per pupil in ADA.

In addition, the allegations made by the plaintiffs in *McInnis* are similar to the contentions of the Appellants in the instant case. A copy of the complaint filed in *McInnis* is attached as an appendix to this Motion.

The following shows the similarities of the complaints:

Allegations in Complaints

1. There exist material disparities in the quality of educational programs, facilities and services in the various school districts.
In Illinois Case—Paragraph 15 of Complaint
In Virginia Case—Paragraphs 11 and 12 of Complaint

2. There exist material disparities in the levels of educational attainment achieved by students in different school districts.
In Illinois Case—Paragraphs 16 and 17 of Complaint
In Virginia Case—Paragraph 16 of Complaint

3. The method of financing fails to relate to educational needs of students.
In Illinois Case—Paragraph 18a of Complaint
In Virginia Case—Paragraph 14.1(c) of Complaint

4. The method of financing fails to consider geographical variations in school needs, school construction costs, teacher and professional salaries and other similar costs.
In Illinois Case—Paragraph 18b(1) of Complaint
In Virginia Case—Paragraph 14.3 of Complaint

5. The method of financing fails to consider the added costs necessary to educate those children from culturally and economically deprived areas.
In Illinois Case—Paragraph 18b(2) of Complaint
In Virginia Case—Paragraph 14.4 of Complaint

6. The method of financing fails to provide to each child an equal opportunity for an education.
In Illinois Case—Paragraph 18c of Complaint
In Virginia Case—Paragraphs 12, 13 and 14 of Complaint

It is to be remembered that *McInnis* was disposed of on a Motion to Dismiss affirmed by this Court. This is the position in which this case is found.

Appellants and *amici curiae* have made tortured efforts to distinguish the cases in both of which the strikingly similar allegations were taken as conceded in the court below. The evidence taken and cited by Appellants is nothing more than affirmance of the allegations of the complaint. In fact, the court below said in reference to *McInnis*:

> "... The circumstances of that case are scarcely distinguishable from the facts here. Virginia's division of school funds closely paralleling Illinois'." (p. 5a of Appendix to Jurisdictional Statement.)

Because of the similarities in the financing of Illinois' public schools and of Virginia's public schools and because of the similarities of the allegations contained in the complaints, the Appellees again submit that *McInnis* disposes of the issues here presented.

A

The Fourteenth Amendment Question

It was concluded in *McInnis* that the Fourteenth Amendment does not require that distribution of educational funds to the various school districts be made only on the basis of educational need. In this connection, District Judge Decker said for the three-judge Court:

> "Without doubt, the educational potential of each child should be cultivated to the utmost, and the poorer school districts should have more funds with which to improve their schools. But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court. To illustrate, the following considerations might be relevant to a financ-

ing scheme: state-wide variations in costs and salaries, the relative efficiency of school districts, and the need for local experimentation.

"As stated in Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584, 55 S.Ct. 538, 540, 79 L.Ed. 1070 (1935):

> '[T]he burden of establishing the unconstitutionality of a statute rests on him who assails it. . . . A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.'

"And more recently, the Supreme Court declared that:

> '[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'

"McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). See also Salsburg v. Maryland, 346 U.S. 545, 552-553, 74 S.Ct. 280, 98 L.Ed. 281 (1954).

"Tested by these standards, the existing school legislation is neither arbitrary nor does it constitute an invidious discrimination. It therefore complies with the Fourteenth Amendment." (293 F. Supp. at page 332.)

The three-judge court below likewise found Virginia's distribution formula was not arbitrary, saying:

> "Our reexamination of the Act confirms that the cities and counties receive state funds under a uniform and consistent plan." (p. 4a of Appendix to Jurisdictional Statement.)

B.

The Controversy Is Not Justiciable

As to the issue of whether or not the controversy is justiciable, the court below found:

> "... the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State. We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here." (p. 5a of Appendix to Jurisdictional Statement)

The soundness of the view of the court below is illustrated by the following quotation found in Professor Philip B. Kurland's article, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined":

> "... Given even the least complex measure of the proper standard of equality, dollar equivalence, how can it [the Court] bring about the necessary change? For the principle calls for a fundamental revision of state governmental structure.
>
> "The Court, therefore, cannot leave with the local unit the discretion as to how much it is to tax its constituents and what portion of that amount is to be devoted to educational purposes. Will it then command that all educational expenditures shall be made by the state and no local government unit shall supplement that grant. Will it tell the state how it shall raise the necessary revenues?
>
> "Assuming it manages a transfer of responsibility for educational systems to the central government of the state, will it fix a minimum that must be spent on each pupil? If not, but if the amount fixed by the state legislature is above the minimum theretofore prevailing, will the state be able to provide those educational facilities in public schools that are now available

in its best school systems? If not, will there be some way of keeping the children of the more affluent groups within the public school systems? If the more affluent groups remove their students from the public school systems, will the notion of equality as a means of protecting the poor be effective? (As of the moment, for example, the community in the neighborhood of the University of Chicago is about as heavily taxed for educational facilities as even the more affluent northern suburbs. But the children of the community are to a very large extent receiving their formal education through private schooling.) Would a single standard, throughout the state, but a low one, not be the inevitable result of efforts by the Court to dictate the means of achieving equal educational opportunity?" 35 U. of Chi. L. Rev. 583, 597-598.

Likewise, the three-judge Court in *McInnis* concluded that it was not justiciable saying:

"Even if the Fourteenth Amendment required that expenditures be made only on a basis of peoples' educational needs, the controversy would be non-justiciable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.

". . . Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning. As early as 1919 Mr. Justice Holmes explained that 'the Fourteenth Amendment is not a pedagogical requirement of the impracticable.' " (293 F.Supp. at 335-336)

In summary, the present Virginia method of financing public schools reflects a rational policy consistent with the provisions of the Virginia Constitution for the same reasons

that the Illinois method does as set forth in *McInnis*. The conclusions reached there are equally applicable here.

> ". . . Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. Moreover, the statutes which permit these unequal expenditures on a district to district basis are neither arbitrary nor unreasonable.
>
> "There is no Constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student." (293 F.Supp. at page 336)

CONCLUSION

For the reasons stated, the Appellees respectfully submit that this case should be dismissed or, in the alternative, the judgment of the court below should be summarily affirmed.

Respectfully submitted,

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